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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	7
Reasons for granting the writ	7

CITATIONS

Case:	
Helvering v. *City Bank Farmers Trust Co.*, No. 805, October Term, 1934	7
Statute:	
Revenue Act of 1926, c. 27, Sec. 302, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 1094)	3

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. [illegible]

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WALDEMAR R. HELMHOLZ, AS SOLE DEVISEE AND legatee under the will of Irene C. Helmholz, deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on December 31, 1934, affirming a decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12) is reported in 28 B. T. A. 165. The opinion of the United States Court of Appeals for the District of Columbia is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 31, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent and other members of her family transferred certain stock to a trustee, to pay to each of the several settlors for life the dividends in respect of the shares transferred by the respective settlors, with certain remainders over. The trust instrument provided that the trust would terminate upon the delivery to the trustee of a written instrument signed by all of the then beneficiaries declaring the trust term at an end. The questions presented are:

1. Whether the stock transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the stock was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> (U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 12–16) may be summarized as follows:

The respondent is the administrator and sole beneficiary of the estate of Irene C. Helmholz, a resident of Wisconsin, who died in 1927 (R. 12–13). In 1918 the decedent and other members of her family executed an agreement whereby they conveyed certain stock of the Patrick Cudahy Family Company in trust to pay to each subscriber for life the dividends in respect of the shares transferred by the subscriber; and upon the death of each subscriber, to pay the dividends to such person or per-

sons for life as the subscriber might by will appoint; and upon failure of appointment or upon expiration of the term of appointment, then to pay the dividends to the issue of such subscriber at the time of distribution (R. 13-14).

The trust agreement provided in part as follows (R. 33-34):

> Fifth. The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.
>
> The term of the primary trust hereby created shall also terminate upon the dissolution of said the PATRICK CUDAHY FAMILY

COMPANY in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to hold and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

The decedent left a will, which was admitted to probate, and in which she bequeathed all her prop-

erty to her husband, the respondent (R. 14). The Supreme Court of Wisconsin construed the will as a valid exercise by the decedent of the power of appointment reserved in the trust agreement (R. 17).

The articles of incorporation and bylaws of the Cudahy Company provided that no transfer of stock should be valid except in pursuance of the vote of a majority of the shares and before offering the stock in writing to the board of directors for purchase at par value (R. 14–15). The Commissioner determined that the entire value of the Cudahy stock should be included in the decedent's gross estate under Section 302 (c) and (d) of the Revenue Act of 1926 and that the stock should be valued at $320 per share. The taxpayer appealed to the Board of Tax Appeals, which decided that the property should not be included in the decedent's gross estate because it was not within the terms of Section 302 (c), (d), or (f), and that the stock should be value at $100 per share.

The parties stipulated that the decision of the Board of Tax Appeals might be reviewed by the United States Court of Appeals for the District of Columbia (R. 23–24), which decided that the corpus of the trust should not be included in the gross estate of the decedent under Section 302 (c) or (d) of the Revenue Act of 1926 and did not pass upon the question as to the value of the stock which the decedent transferred in trust.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to determine that the enjoyment of 999 shares of Patrick Cudahy Family Company stock was subject to change at the death of the decedent through the exercise of a power by the decedent in conjunction with others to alter, amend, or revoke, within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926 which are also involved in *Helvering* v. *City Bank Farmers Trust Co.*, No. 805, October Term, 1934, in which the Government is seeking certiorari to the United States Circuit Court of Appeals for the Second Circuit. In addition to the reasons set forth in our petition in the *City Bank Farmers Trust Co.* case, *supra,* the Assistant General Counsel for the Bureau of Internal Revenue advises that there are twelve cases pending in his office involving the construction of Section 302 (d) of the Revenue Act of 1926 and that the approximate amount of tax involved is $347,000. We have also been advised that there are fifty-five such cases pending in the Estate Tax Division of the Tax Unit involving approximately $4,500,000.

For the reasons set forth in our petition in the *City Bank Farmers Trust Co.* case, *supra*, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MARCH 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935